

LOS ANGELES BAR BULLETIN



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PRESIDENT'S PAGE



H. F. Selvin

ON OCTOBER 25, 1951, Roger Jessup, Chairman of the Board of Supervisors, announced that agreement had been reached to locate the long desired but as yet unrealized Civic Center Courts Building on the west side of Hill Street between First and Court Streets. That announcement brings into the realm of possibility the successful culmination of years of effort designed to bring about adequate housing for our courts.

Nearly one year has passed since the plans for courts buildings to be erected on Temple Street were abandoned. When that abandonment occurred the future of the courthouse project looked very dim—so dim, indeed, that I was prompted to say in these pages that it was my "suspicion that the real purpose behind the move was the complete abandonment of any courthouse program whatever." The event has belied that pessimistic conclusion. The recently announced determination to proceed on Hill Street could not have been reached without the active support and encouragement of the very persons and organizations who were so instrumental in bringing about the Temple Street abandonment. It is now obvious that the suspicion which I previously voiced was not justified; and I am glad to be able to say so at this time.

Special acknowledgment should also be made of the part played in the situation by the Department of Water and Power, which owns the new site. Without the public-spirited attitude of cooperation displayed by the Department, involving revision of its own plans for use of the site, no amicable solution could have been reached.

HERMAN F. SELVIN.

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LAWFUL COMPENSATION IN EMINENT DOMAIN

By Milnor E. Gleaves*



Milnor E. Gleaves

THE continuing transition of Los Angeles County to the status of a metropolitan community, accelerated by post-war migration and development, is paced by the acquisition of private lands by public bodies for a great variety of uses. A strong inclination of many families to live in Southern California, and their tendency to buy and build homes in newly-developed areas at some distance from established centers, has made it necessary

for state and local officials to secure sites in these areas for schools, parks, fire stations, courts, flood control channels and many other public service activities, as well as new and improved streets and highways to reach them. Consequently, the counsel and advice of lawyers in general practice is being sought more and more frequently by clients whose property is to be condemned for some public use.

Two questions are generally first on the lips of every such client: Do they have to take *my* property? If they do, how much will I receive for it?

The answer to the first question is in most cases a short one. With the exception of the Los Angeles County Flood Control District,¹ all of the major public bodies exercising the power of eminent domain may find by resolution of their governing boards that a certain site is needed for a proper public use, and such a resolution is *conclusive* evidence of public interest and necessity, and of the fact that the proposed improvement is "located in the manner which will be most compatible with the greatest public good, and the least private injury."²

It is the second question that breeds the most misinformation and misunderstanding, and it falls upon the counsellor to explain

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¹Even with this district, the resolution of its board of supervisors is "*prima facie* evidence" that the taking is necessary. *Los Angeles County Flood Control Act* (D. A. 4463), sec. 16½.

²C. C. P. sec. 1241, subsec. 2. This is not so, of course, where fraud and collusion are involved. *Beals v. City of Los Angeles*, 23 Cal. (2d) 381, 386 (1943).

to his client what exactly is meant by that section of our state constitution that reads

*"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *"*³

I.

The Legislature has required that, in a condemnation case, the court must determine the *value* of the property to be taken; the courts have construed this to mean the fair market value, or the *highest* price the property would bring in a free and objective market.⁴ Determination of this and other elements of compensation, whether by a judge or jury, is usually by aid of the testimony of expert witnesses who are particularly skilled at land evaluation, and who have formed opinions of the worth of the property at bar. These opinions as to value must be anchored to legally relevant principles, however, and cannot be based on what the owner himself had planned to do with the property. They must be based on the highest and best use to which the land could be put in order to realize the greatest financial return, and this in turn may be determined from an examination of similar properties as to size, location, use, zoning, contour, and established price. For example, such a witness can and should consider that a particular tract of farming land is suitable for subdivision purposes where the trend of local development is in that direction and the land is otherwise suited to that purpose, and his opinion should reflect that suitability.⁵ If, however, the particular owner has drawn up his plans for developing the tract, and has computed the sales price that each lot would bring if it were to be subdivided, and the profit that he expected to realize, his plans and figures are inadmissible in a condemnation suit, and expert opinion may not be based upon them.⁶ The same is true concerning testimony of the owner or his witnesses concerning what he has actually been offered and has refused for his property, although these things may and usually are brought to light on cross-examination of the expert witnesses to test their knowledge and competency.⁷ The reason for such rules is the overlying requirement of *objectivity* in valu-

(Continued on page 97)

³Cal. Const., Art. I, sec. 14.

⁴*City of Redding v. Diestelhorst*, 15 Cal. App. (2d) 184, 193 (1936).

⁵*City of Los Angeles v. Hughes*, 202 Cal. 731, 734 (1927).

⁶*City of Los Angeles v. Kerckhoff-Cuzner Mill & Lumber Co.*, 15 Cal. App. 676 (1911); *People v. Olsen*, 109 Cal. App. 523 (1930); *San Diego Land & Town Co. v. Neal*, 88 Cal. 50 (1891).

⁷*City of San Luis Obispo v. Brizzolara*, 100 Cal. 434 (1893).

MARITAL SEPARATION AGREEMENTS AND LIFE INSURANCE

By Robert L. Meyer*



Robert L. Meyer

MARITAL separation agreements in California have been the subject of numerous discussions in this and other legal publications.¹ The purpose of this article is to emphasize the importance of an item of property involved in such agreements and to point out some problems involved in its disposition.

It is apparent, from a brief glance at the appellate decisions in California,² that spouses, at the time of separation, seldom consider life insurance policies as property for which an accounting should be made. There can be no doubt, however, that life insurance is "property"³ and that it is the proper subject of agreement at the time of separation.⁴

I. DISPOSITION

Any consideration of life insurance with relation to separation agreements must begin with a recognition that a life insurance policy paid for, in whole or in part, out of community funds is a chose in action belonging to the community. Each spouse has a "community" interest in the proceeds of such a chose.⁵

Either spouse may, of course, make a gift of his community interest in the policy at any time. Thus, where a policy is made

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¹See, for example, the excellent article by Robert S. Thompson in a recent issue of the BAR BULLETIN, THOMPSON: INCOME TAX PROBLEMS OF CALIFORNIA DIVORCES, 27 L. A. Bar Bulletin 7.

²E.g., *McBride v. McBride*, 11 Cal. App.(2d) 521, 54 P.(2d) 480 (1936); *Jenkins v. Jenkins*, 112 Cal. App. 402, 297 P. 56 (1931); *Blenthin v. Pac. Mutual L. Ins. Co.*, 198 Cal. 91, 243 P. 431.

³*Dixon Lumber Co. v. Peacock*, 217 Cal. 415, 19 P.(2d) 233 (1933); *In re Dobbell*, 104 Cal. 432, 435, 38 P. 87, 43 Am. St. Rep. 123 (1894).

⁴*Gelfand v. Gelfand*, 136 Cal. App. 448, 29 P.(2d) 271 (1934).

⁵*New York L. Ins. Co. v. Bank of Italy*, 60 Cal. App. 602, 214 P. 61 (1923); *Estate of Parr*, 24 Cal. App.(2d) 171 (1937). In these cases, designation of a third party beneficiary by the husband was held voidable by the wife, and she was held entitled to receive one-half of that proportion of the proceeds as was traceable to payments from community funds. Similarly, an interest in a Retirement Fund is also a property right, subject to community property principles, and, where money is paid into the Fund during marriage, the husband's interest is a valuable right which has been purchased with community funds, and is subject to division at divorce. *Crossan v. Crossan*, 35 Cal. App.(2d) 39, 94 P.(2d) 609 (1939). These rights may, however, be varied by agreement. *Cheney v. City & County of San Francisco*, 7 Cal.(2d) 565, 61 P.(2d) 754 (1936), and the rule similarly applied to employee death benefits. *Geltman v. City of Los Angeles, Dept. of W. & P.*, 87 Cal. App.(2d) 862, 197 P.(2d) 817 (1948).

payable to a wife, her executors, administrators or assigns and there is no provision for a change of beneficiary, it has been held that a present gift of the policy has been made to the wife and it constitutes her "separate" property.⁶ If such a gift has been made prior to divorce, no need exists to dispose of the policy in the separation agreement.

As previously noted, a life insurance policy is properly the subject of disposition at the time of divorce.⁷ Indeed, the failure to make disposition of the rights in the policy at this time may have serious repercussions later on.⁸ In the absence of disposition by separation agreement, the trial court may fix the property rights in the exercise of its "broad powers and wide discretion in settling the property rights of the parties."⁹ For example, where the wife has been named beneficiary in the policy, the trial court may order the husband to keep the policy in force by paying to the wife an amount which would permit payment of the premiums,¹⁰ in order that her interest in the policy may be protected.¹¹ If a third party has been made the beneficiary under the policy, a spouse is entitled, at the time of divorce, to reimbursement as to that portion of his or her community interest in funds which have been expended to pay the premiums.¹²

⁶*In re Dobbel*, *supra*, footnote 3. "Where, however, the contract of insurance expressly reserves the right to change beneficiaries it has been held that the interest of the designated beneficiary prior to the death of the insured is that of a mere expectancy of an incomplete gift." (*Estate of Castagnola*, 68 Cal. App. 732, 736, 230 P. 188, 190 (1924).)

⁷*Gelfand v. Gelfand*, *supra*, footnote 4.

⁸See, for example, *Jenkins v. Jenkins*, *supra*, footnote 2.

⁹*Tompkins v. Tompkins*, 83 Cal. App.(2d) 71, 78, 187 P.(2d) 840, 844 (1947).

¹⁰*Tompkins v. Tompkins*, 83 Cal. App.(2d) 71, 187 P.(2d) 840 (1947). The court in this decision reconciled its holding with *Gelfand v. Gelfand*, *supra*, footnote 4, upon the ground that in *Phoenix v. Birkelund*, 29 Cal.(2d) 352, 175 P.(2d) 5 (1946), the Supreme Court had recognized the wife's right to an interest in the policy to the extent that premiums were paid out of community funds, and that this interest could, therefore, be protected by the court at the time of the divorce. No mention was made as to the continuation of an insurable interest in proceeds attributable to premiums paid after divorce.

¹¹Mention should be made of the peculiar situation involved in *National Service Life Insurance*. In *Wissner v. Wissner*, 338 U. S. 655, 70 S. Ct. 398, 94 L. Ed. 332 (1950), the United States Supreme Court reversed the California District Court of Appeal (89 Cal. App.(2d) 759, 201 P.(2d) 837 (1949)), and held a husband entitled to name any beneficiary of his choice under an N. S. L. I. policy even though premiums were paid from community funds. The Court left open the question as to a wife's right to reimbursement for premiums paid. It would seem clear, however, that a wife would be so entitled. *Gelfand v. Gelfand*, *supra*, footnote 4. It might be argued that, since, under the *Wissner* decision, a husband would have full right of management and control of the policy, plus absolute power over the proceeds, an N. S. L. I. policy constitutes separate property of the husband, and all that is required is reimbursement to the wife as to one-half of the premiums paid.

¹²*Gelfand v. Gelfand*, *supra*, footnote 4. This decision contained dictum to the effect that, where the wife had been named beneficiary, she would not be entitled to reimbursement, and based its reasoning, that reimbursement was the remedy to be considered, upon the theory that, after divorce, a wife would not have an insurable interest in any policy. It relied upon Texas decisions, which so hold, but ignored California decisions, in which a wife's insurable interest had been protected although the issue was not raised. *McGrew v. Mutual L. Ins. Co.*, 132 Cal. 85, 64 P. 103 (1901); *Curtis v. Grand Lodge A. O. U. W.*, 135 Cal. 552, 67 P. 970 (1902).

If no disposition of the policy is made by the court and it stays in possession of its named owner, the interest of the other spouse continues in that part of the policy paid for out of community funds.¹³ And, where the other spouse remains as the beneficiary under the policy, he or she may take the proceeds to the exclusion of a second wife or husband, with the exception of one-half of that part of the proceeds as may be held attributable to premiums paid from community funds of the second marriage.¹⁴ The named owner of the policy has absolute title if the decree recites that there is no community property or affirms a complaint so stating, or purports to dispose of all community property and does not dispose of the insurance.¹⁵

Although the trial court at the time of divorce may deal with the life insurance without prior agreement of the parties, it is preferable for the parties to provide for its disposition by agreement. The assignment of any rights in a life insurance policy in a separation agreement is adequate consideration for property received in return, and will, in the absence of fraud, be so considered against any claims of creditors of the transferor.¹⁶

Even where an agreement is entered into, problems may still arise. The rights in a policy are separate rights and must be so treated and disposed of. Where the policy is one of endowment, for example, and the wife is an irrevocable beneficiary, if the husband is awarded all the property standing in his name by an agreement, he has been held the absolute owner of all the endowment rights under the policy.¹⁷ It is essential, therefore, that all rights under the policy be expressly disposed of in the agreement. Moreover, where the rights in the policy are transferred, the policy itself should be physically transferred to the transferee. If the transferee is to pay the premiums thereon, he or she, of course, must do so; otherwise, the transferor may exercise any rights under the policy to change the beneficiary, and that beneficiary will be entitled to the proceeds allocable to subsequent premiums paid by the transferor.¹⁸

It is also important to have the beneficiary of the policy changed to agree with the desires of the transferee, if the policy is trans-

(Continued on page 103)

¹³*McBride v. McBride*, *supra*, footnote 2.

¹⁴*Jenkins v. Jenkins*, *supra*, footnote 2.

¹⁵*Jenkins v. Jenkins*, *ibid.*

¹⁶*Dixon Lumber Co. v. Peacock*, 217 Cal. 415, 19 P.(2d) 233 (1933).

¹⁷*Simons v. Miller*, 171 Cal. 23, 151 P. 545 (1915).

¹⁸*Phoenix Mutual L. Ins. Co. v. Birkelund*, 29 Cal.(2d) 352, 175 P.(2d) 5 (1946).



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NOTES ON NEW LEGISLATION

By Chester I. Lappen and Philip F. Westbrook, Jr.*

ONE of the few bargains in this period of constantly increasing prices is the number of new laws which can be secured from one session of the California Legislature—the recent session enacted a staggering 1765 chapter laws. Not all of the new legislation is earth-shaking although it is reassuring to note that it is now a crime to go hunting with a bow and arrow while intoxicated (Ch. 849) or to drive an automobile equipped with a television set visible to the operator (Ch. 1628).

Whereas only a relatively few of the 1951 Chapter Laws became effective immediately upon their enactment and signature by the Governor, the respite to the average petitioner was short-lived—with few exceptions the remainder took effect September 22, 1951. As of this writing, pocket parts and slip amendments have appeared for some of the more commonly used codes, but it will be many months before even these aids to followers of the law are available for all codes.

Time, energy, space and ability preclude the presentation of a compendium of all the legislative changes.¹ The purpose of this note is merely to call attention to some of the new laws which it is believed will be of general interest to practicing attorneys.

CIVIL CODE.

Incurable Insanity as Grounds for Divorce.

Section 108 of the Civil Code has been amended to eliminate the unconstitutional requirement that, to secure a divorce on the grounds of incurable insanity, one must plead and prove reasonable ability to support the insane spouse or the availability of property of the insane spouse to provide support for the remainder of such spouse's life expectancy. Now the Court "may," instead of "shall," as formerly, make such order for support or require a bond therefor as circumstances require. It is further provided that a divorce upon this ground may be granted upon proof that the insane spouse has been incurably insane for a continuous pe-

*Members of the editorial board of the LOS ANGELES BAR BULLETIN. The authors gratefully acknowledge the assistance of William J. Kraker in the preparation of this note.

¹The California Land Title Association has published a pamphlet containing many helpful comments in summary form: Cerini, Floyd B., "Summary of 1951 Legislation of Interest to Title Companies." The State and Local Government Department of the Los Angeles Chamber of Commerce has published a "Report on the 1951 Regular Session of the California Legislature," which deals generally with legislative enactments of interest to business.

riod of three years immediately preceding the filing of the action and has been under the jurisdiction of an institution; previously, the only permissible proof was that the incurably insane spouse had been under the jurisdiction of an institution for a period of three years (Ch. 1580).

Rights of Husband; Separate Maintenance.

By appropriate amendment to Sections 137 *et seq.* of the Civil Code, it is provided: that a husband shall have the same rights as a wife with respect to support and alimony; that an action for separate maintenance may be instituted and decree relating thereto obtained in the same manner as a divorce; that support and division of property may be obtained pursuant to a decree of separate maintenance; and that after the rendition of a decree for separate maintenance the earnings or accumulations of each party are the separate property of such party (Ch. 1700).

Management and Control of Community Property.

By the addition of Section 171c to the Civil Code, the wife is given management and control of her earnings and of the proceeds of any judgment for personal injury to her (except to the extent needed to defray medical expenses) until such moneys have been commingled with other community property (Ch. 1102).

Rules Against Remoteness of Vesting and Against Suspension of the Power of Alienation.

The rule against remoteness of vesting was conformed unequivocally to the American common law rule against perpetuities, utilizing the accepted measurement of lives in being plus 21 years, and the rule against suspension of the power of alienation was modified to utilize the same time measurement by the amendment of Sections 715, 716, 771 and 773 of the Civil Code and the repeal of Sections 772 and 774. The legislation included special saving clauses for wills and other instruments executed prior to the effective date (Ch. 1463).

Recitals in Trustee's Deed.

The conclusive effect of recitals in a trustee's deed in favor of *bona fide* purchasers and encumbrancers for value without notice was extended, by amendment to Section 924b of the Civil Code, to instances where no notice of default or sale had been requested and where as a consequence such notice had been published or delivered personally to the trustor (Ch. 417).

Recitals in Corporate Acknowledgments as Evidence.

By the addition of Section 1190.1 to the Civil Code, the certificate of acknowledgment by a corporation's officers of an instrument, other than an instrument conveying all or substantially all of its assets, may contain a statement that the corporation executed the instrument pursuant to its by-laws or a resolution of its board of directors. This recital is made *prima facie* evidence that the instrument is the act of the corporation and that it was duly executed pursuant to authority given by its by-laws or its board of directors. It is further made conclusive evidence of such matters in favor of a good faith purchaser, lessee or encumbrancer (Ch. 482).

Lost and Unclaimed Property.

With minor changes in language, the provisions of the Political Code relating to lost and unclaimed property were transferred to the Civil Code as Sections 2080-2082, inclusive (Ch. 656).

Acknowledgment of Certificate of Transacting Business Under Fictitious Name.

Section 2468 of the Civil Code was amended to require the signatories to a certificate to transact business under a fictitious name to personally appear before the officer taking the acknowledgment (Ch. 1103).

Bulk Sales and Transfer of Personal Property Without Delivery of Possession.

The confusing provisions of Section 3440 of the Civil Code have been repealed. New Section 3440 relating to transfers of personal property without immediate delivery and new Section 3440.1 relating to bulk sales set forth the law on these subjects with much greater clarity than before (Ch. 1687).

CORPORATIONS.**Retirement of Shares.**

Section 1713 of the Corporations Code has been amended so that it is no longer necessary to reduce the authorized number of shares when shares are retired unless the articles provide that such shares are not to be reissued (Ch. 1377).

Service of Process-Designation of a Corporation as Process Agent.

Section 3301 of the Corporations Code has been amended to eliminate the provision expressly stating that the filing of a list

of officers by a domestic corporation is optional and not required. By addition of new subsections and amendment of the appropriate existing sections, the Corporations Code now provides that any corporation may designate a corporation as its agent for the service of process (as an alternative to the designation of a natural person) if the corporation so designated has filed the appropriate certificate with the Secretary of State (Ch. 628).

Amendments Before Issuance of Shares.

Section 3630 of the Corporations Code has been amended to permit the amendment to the articles of a stock corporation, which has issued no shares or subscriptions, to be made by resolution adopted by at least two-thirds of the board of directors as well as by two-thirds of the incorporators as previously provided. There is a corresponding change in Section 3671 concerning the certificate to be filed (Ch. 1377).

Restated Articles of Incorporation.

The present provision for consolidation of amendments to the articles of incorporation has been revised to authorize a restatement of articles as amended to be made in a single instrument and to authorize the filing of such restated articles wherever the filing of copies of articles is required. Sections 3800 and 3802, Corporations Code (Ch. 1377).

Merger and Consolidation.

Sections 4103, 4110, and 4113 of the Corporations Code make some technical changes in the proceedings in connection with a merger or consolidation (Ch. 1377).

Reorganization Under Federal Law.

By the addition of a new chapter to the Corporations Code, Sections 4400-4405, inclusive, a domestic corporation which under federal law has entered into a plan of reorganization confirmed by court order or decree, has full power and authority to put into effect and carry out the plan and decrees or orders of the court relative thereto and may take any proceedings and do any act provided in the plan or directed by such decree or order without action by the directors or shareholders, (*e.g.*, amend or repeal by-laws, amend articles of incorporation, change its capital, name, or appoint additional or new officers or directors, dissolve, merge) (Ch. 832).

(Continued on page 113)

WILLS, CHARITABLE BEQUESTS, EFFECT OF PROBATE CODE

SECTION 41

TESTATOR died within 30 days after having executed a will in which he provided for a life estate with remainder over to charities. The residue of the estate was bequeathed to a stranger. Heirs of the testator petitioned for determination of heirship, asserting the charitable gifts were void under Probate Code Section 41 and claiming to be entitled to the total amount of the gifts. *Held*: The gifts to charities could not be set aside. *Estate of Z. S. Leymel*, 103 A. C. A. 883 (April 25, 1951).

Section 41 of the Probate Code has been in force since 1873 with frequent revisions. It purports to invalidate all bequests to charity made within 30 days of death and bequests to charity made at any time in excess of one-third of the testator's estate, in favor of certain relatives. However, it has never prevented ownership or acquisition of property by charities. Ostensibly, its purpose has been to curb death-bed generosity at the expense of natural objects of testator's bounty. See *Estate of Dwyer*, 159 Cal. 680, 115 Pac. 242 (1911). Prior to 1943 Section 41 effectively accomplished this purpose, although under its various amendments there was occasional litigation to determine whether heirs would prevail over substitutional or residuary legatees in succeeding to a void charitable bequest. Compare *Estate of Russell*, 150 Cal. 604, 89 Pac. 345 (1907), with *Estate of Broad*, 20 Cal. (2d) 612, 128 P. (2d) 1 (1942).

In 1943 the Legislature added language to Probate Code Section 41 which enables a careful draftsman to avoid its provisions completely. In substance it provides that a charitable bequest which is within its provisions may not be set aside except by a spouse, brother, sister, nephew, niece, descendant or ancestor of the testator who takes the charitable bequest under a residuary or substitutional bequest in the will or under the laws of succession *because of the absence of other effective disposition in the will*.

The instant case and *Estate of Davis*, 74 Cal. App. (2d) 357, 168 P. (2d) 789 (1946); *Estate of Haines*, 76 Cal. App. (2d) 673, 173 P. (2d) 693 (1946); and *Estate of Davison*, 96 Cal. App. (2d) 263, 215 P. (2d) 504 (1950), have established that such "other effective disposition" in the will may be made by the

simple device of providing that if the bequest to charity is held to be void it shall pass to some person not a relative within the named classes. Such person has no standing to object to the bequest, and, since he is named as substitute legatee instead of the relatives, the relatives also have no standing to object. Consequently the bequest must be sustained.

For the present, testators bent on doing acts of charity need not be denied. But lawyers using the artificial device outlined above should carefully follow the future of Probate Code Section 41.—
JOHN S. WELCH.

LANGUAGE FROM THE SUPREME COURT

On December 11, 1950, in the case of *McGrath v. Kristensen*, involving naturalization, Mr. Justice Jackson in concurring discusses engagingly a phase of the judicial problem that is not generally seen:

"I concur in the judgment and opinion of the Court. But since it is contrary to an opinion which, as Attorney General, I rendered in 1940, I owe some word of explanation. 39 Op. Atty. Gen. 504. I am entitled to say

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of that opinion what any discriminating reader must think of it—that it was as foggy as the statute the Attorney General was asked to interpret. It left the difficult borderline questions posed by the Secretary of War unanswered, covering its lack of precision with generalities which, however, gave off overtones of assurance that the Act applied to nearly every alien from a neutral country caught in the United States under almost any circumstances which required him to stay overnight.

The opinion did not at all consider aspects of our diplomatic history, which I now think, and should think I would then have thought, ought to be considered in applying any conscription Act to aliens."

Page 253—"It would be charitable to assume that neither the nominal addressee or the nominal author of the opinion read it, and I do not doubt that explains Mr. Stimson's acceptance of an answer so inadequate to his questions. But no such confession and avoidance can excuse the then Attorney General. Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Tanney, *License Cases*, 5 How. 504, recanting views he had pressed upon the Court as Attorney General of Maryland in *Brown v. Maryland*, 12 Wheat. 419. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, 'The matter does not appear to me now as it appears to have appeared to me then.' *Andrews v. Styrap*, 26 L.T.R. (N.S.) 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: 'My own error, however, can furnish no ground for its being adopted by this Court. . . . ' *United States v. Gooding*, 12 Wheat. 460, 478. If there are other ways of gracefully and good-naturedly surrendering former views to a better considered position, I invoke them all."—J. L. M.

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LAWFUL COMPENSATION

(Continued from page 84)

ation, and it is one that is frequently difficult to explain to a private owner who has his own ideas for developing his property.

The value of a house upon a lot is of serious concern to an owner who may have spent several thousand dollars in painting or fencing it or installing a patio and a barbecue in his back yard. The code, however, requires that the improvements be valued with the land, rather than separately,⁸ the purpose not being to determine what the particular improvement cost the owner, but what it adds to the fair market value of the whole property. An owner who is skilled as a mason or carpenter may add much to the value of his property at relatively little cost to himself, while an eccentric may lay out many dollars for an effect that may actually detract from his initial investment.

Improvements that are not fixed to the land itself may not be paid for, nor may the owner claim compensation for the cost of moving them away, because the law considers that no part of his movable property is being taken by the condemnation.⁹

Frequently, owners of business property claim that the taking results in a pecuniary loss to them from damage to their business and good will. True as the fact may be, the law deems such an asset to be too intangible and too subjective for recognition in a condemnation case, and the attorney must advise his client that the loss is *damnum absque injuria*, and not part of the fair market value to which he is entitled.¹⁰

II.

The element of severance damage is probably the most difficult to measure by a fixed standard, and it is here that the widest differences of opinion occur, expert or otherwise. The relevant code section says, in effect, that where only a part of a piece of property is taken, the owner is entitled not only to the value of the part taken, but to any damage to the remainder caused by the taking and by the "construction of the improvement in the manner proposed by the plaintiff."¹¹ Against this damage may be offset special benefit accruing to the remainder by reason of the improvement.¹²

⁸C. C. P. sec. 1248, subsec. 1.

⁹C. C. P. sec. 1248, subsec. 1; *County of Los Angeles v. Signal Realty Co.*, 86 Cal. App. 704, 711 (1927); *People ex rel. Dept. of Public Works v. Auman*, 100 Cal. App. (2d) 262 (1950).

¹⁰*Oakland v. Pacific Coast Lumber etc. Co.*, 171 Cal. 392, 398-399 (1915).

¹¹C. C. P. sec. 1248, subsec. 2.

¹²C. C. P. sec. 1248, subsec. 3.

The courts in this state have adopted a formula for measuring severance damage, usually referred to as the "before and after" rule: the owner is entitled to the difference between what the part not taken was worth before the taking, and what it was worth after the severance and the construction of the improvement.¹³ Without more, this rule would seem to entitle the property owner to be compensated for *every* type of damage that occurs to his remainder, and many claims are made on behalf of such owners on this basis.

The cases, however, have construed the severance section of the statute to refer only to that damage caused by a "direct, physical disturbance of an actual existing property right which the owner possesses in connection with his property."¹⁴

Obviously, this judicial construction of the severance section excludes from the area of lawful compensation some of the actual results that may follow in the wake of a proposed condemnation. Many of the incidents of ownership or elements of value of the remaining real property are not considered to be "actual existing property rights" within the meaning of the rule.

For instance, a large tract of land is owned by a party who intends to subdivide it. A school district condemns a portion of the property. The owner contends that the proximity of a school to the remainder of his property would depress the market value of the adjacent lots. Actually, this may be so. However, tested by the rule laid down by the courts, this owner has no more right *not* to have a public school next to his property, if there are no zoning prohibitions present, than has his neighbor who has had none of his property taken in the action. If there has been damage, it is damage suffered only in common with the general public, for which the individual owner is not entitled to be compensated.¹⁵ If he is shocked to learn that this be true, it may or may not be of some comfort for him to know that the California courts have discussed the same rule in connection with the establishment of a public building such as a jail or contagious disease hospital;¹⁶ with the draining of sewage into the sea adjacent to the owner's property;¹⁷ and with the removal of residences from the part

¹³*People v. Ricciardi*, 23 Cal. (2d) 390, 401 (1943); *People v. Gianni*, 130 Cal. App. 584, 587 (1933).

¹⁴*City of Los Angeles v. Geiger*, 94 Cal. App. (2d) 180 (1949); *Eachus v. L. A. Railway Co.*, 103 Cal. 614, 617 (1894).

¹⁵*City of Los Angeles v. Geiger*, *supra*, Note 14, at pp. 190-191.

¹⁶*Eachus v. Los Angeles Ry. Co.*, *supra*, Note 14, at p. 617; *People v. Ricciardi*, *supra*, Note 13 at p. 414 (1943) (dissenting opinion of Mr. Chief Justice Gibson).

¹⁷*Sanitation Dist. No. 5 v. Averill*, 8 Cal. App. (2d) 556, 565 (1935).

taken, leaving the land vacant, and the discontinuance of a street car line, which had been a convenience to the owner and the removal of which lowered his property values.¹⁸

On the other hand, some factors which have been considered as compensable elements of value are reduction in size of the remaining land, reduction of the land into an irregular or odd-sized remainder no longer adapted to the highest and best use, curtailment of parking area, reduction of the commercially zoned portion of the property, and impairment of the use of the property as a functioning unit caused by the taking of integral parts of an operating plant.¹⁹

III.

Freeway construction locally has raised many problems, both practical and legal, for lawyers whose clients own property lying adjacent to, but not directly within the path of vehicular progress. What today may be a through street in a quiet residential neighborhood may tomorrow be closed off by a limited-access express highway. In another locality, a small business man may find that after a freeway project is complete, his store fronts no longer upon the same busy street, but upon a service road parallel to and fenced off from the freeway. As a result, there may be damage caused "by the construction of the improvement in the manner proposed."²⁰ Since the property owner does not part with any of his acreage in such a situation, his remedy is to bring an action in "inverse condemnation" for damages already caused to his holding. As in an ordinary condemnation case, the standard is again fair market value. The problem of determining the line between what is compensable damage and what is not, however, is often as puzzling to the general practitioner as it is to his client. The general test may be said to be the difference between *diversion of traffic*, which is non-compensable, and *impairment of access*, for which compensation may be claimed. It is doubtful, however, if the law in this regard is any more than just abreast of the varying factual situations that constantly arise.

A frequent situation is that in which a freeway cuts off one end of a through neighborhood street, and a *cul-de-sac* is formed. The client who owns a lot in the first block has a lawful claim for damages, because it is said that he has a legal right to the

¹⁸*City of Los Angeles v. Geiger*, *supra*, Note 14, at p. 192.

¹⁹*People v. Ricciardi*, *supra*, Note 13, at p. 398.

²⁰C. C. P. sec. 1248, subsec. 2.

same ingress and egress on his street to the first intersection in either direction as he had before.²¹ The same is true for his alley.²² It is not true, however, for a closure of either beyond the first intersection.²³

In the case of the storekeeper, the law varies with the situation. He has an easement of access which amounts to a property right in the same way that he has easements of light and air. Thus, if the middle of his street is excavated and an underpass or sub-way is built to replace the former grade of the street, he may be awarded damages for loss of direct access, and this is true even though a small surface-level roadway is left in front of his store. He may even make a proper claim by reason of the fact that the view of his premises from the main highway has been cut off. The courts state that the owner has "an easement of reasonable view" of his property from the adjacent highway.²⁴ But no part of his claim may be based upon the fact that the main stream of traffic has been diverted from his door because of the improvement, for this in effect is a damage to his business and not to his realty, and for that reason is legally non-compensable.²⁵ For the same reason, the same storekeeper may not recover damages if a main highway on which he fronts is rerouted through a different part of the neighborhood, and the traffic misses his store entirely, so long as the street he had is still left as it was before.²⁶ This same reasoning has been extended by the courts recently to include the situation of a gas station and garage owner whose property fronted on one side of a major through highway, down the middle of which the state constructed a concrete dividing island. As a result, the traffic using the other side of the highway could not turn in to his establishment, nor could his customers make a left turn out of it, and he brought an action alleging depreciation of the market value of the property. It was held that he had no lawful claim, since the most that he could show was that his customers were forced by the improvement to drive an extra block or so to enter and leave his station, and that this amounted only to a circuity of travel shared by all members of the general public driving in the neighborhood.²⁷

²¹*Bacich v. Board of Control* (1943), 23 Cal. (2d) 343.

²²*Beault v. City of Los Angeles* (1943), 23 Cal. (2d) 381.

²³*Bacich v. Board of Control*, *supra*, Note 21.

²⁴*People v. Ricciardi*, *supra*, Note 13, at p. 404.

²⁵*Rose v. State of California*, 19 Cal. (2d) 713 (1942); *People v. Ricciardi*, *supra*, Note 13; *City of Los Angeles v. Geiger*, *supra*, Note 14.

²⁶*People v. Gianni*, *supra*, Note 13.

²⁷*Holman v. State of California*, 97 Cal. App. (2d) 237 (1950) (hg. den.).

IV.

Occasionally, it will be the lessee and not the owner of property under condemnation who comes in to a lawyer seeking advice concerning his rights. The existence of a leasehold estate may complicate the analysis of the respective rights of landlord and tenant in an award, and is a frequent cause of the breakdown of negotiations with the government agency prior to the action itself.

The measure of the lessee's damage, aside from improvements affixed by him to the land to which he retains title, is the market value of his unexpired lease. Translated in terms of condemnation law, he has a right to have a court or jury decide what the unexpired term of his lease would be worth on the open market if he had wanted to sell it, over and above his liability for rent under the lease.²⁸

Difficulty arises when lessor and lessee attempt to evaluate their several estates without legal guidance. The general premise is, of course, that while the existence of a lease may have some effect, good or bad, upon the fair market value of a piece of realty, such value *includes* the worth of the leasehold interest, and is not in addition to it.²⁹ Consequently, the lessor and the lessee must share in the total award, and frequently they disagree so thoroughly on their respective values that a lawsuit is made inevitable.

While the code requires that the value of each of several interests must be determined in condemnation suits,³⁰ it also permits the condemning body to have the fair market value of the whole property determined first as between it and all adverse claimants.³¹ Thereafter, in the same proceeding, the values of the several claims may be determined, and the court costs of this determination are borne by the condemning body, except where a conflict of claims to the same title is involved.

The disruptive effect of a condemnation action upon a lease in which no provision for such a contingency has been made is often a complete surprise to both landlord and tenant. For instance, where a whole building is leased for a term of years, and during the term a part of the building and the underlying prop-

²⁸*Oakland v. Pacific Coast Lumber & Mill So.*, 171 Cal. 392 (1915); *Kishlar v. So. Pac. R. R. Co.*, 134 Cal. 636 (1901); *County of L. A. v. Signal Realty Co.*, 86 Cal. App. 704, 712 (1927).

²⁹See 18 Cal. L. Rev. 31, 36 (1929).

³⁰C. C. P. sec. 1248, subsec. 1.

³¹C. C. P. sec. 1246.1; *People v. Buellton Dev. Co.*, 58 Cal. App. (2d) 178, 184 (1943).

erty is condemned, the question arises as to the continuance of rental payments on the remaining portion, and its relation to the award. It was held by our supreme court in such a case that the obligation of the lessee for the entire rent for the balance of the term remained notwithstanding, and that to compensate him for such a burden, he was entitled to the market value of the unexpired leasehold estate.³²

V.

Proceedings in eminent domain are expensive to all concerned. While the public body must bear all costs, the expense of hiring trial counsel and experts in the appraisal field may prove a heavy burden upon the property owner who is not accurately advised of his chances of success under both the facts and the law of his case. Most public bodies will try to work out a settlement where it appears that an owner's claim is reasonably based on lawful elements of damage. Since it is usually to his own lawyer that the owner turns first, the general practitioner is in a position to render both his client and the taxpayer a service by sound advice in the early stages of such an action.

³²*City of Pasadena v. Porter*, 201 Cal. 381 (1927).

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MARITAL SEPARATION AGREEMENT

(Continued from page 87)

ferred. As a precaution, counsel may wish to include in the agreement a provision that, even if the transferor is named as a beneficiary, he or she has no right to the insurance proceeds upon the death of the insured.¹⁹

II. TAX CONSEQUENCES

It is impossible to consider individual rights arising out of ownership of property today without giving some thought to the tax consequences created by them. The life insurance policy is no exception to this rule, and it is particularly dangerous to deal with the rights in this kind of property in a separation agreement without giving some thought to federal tax problems.²⁰

A. Transfer of policy in exchange of property rights.

(1) *Gift tax.* One of the primary means of treating this type of property is to provide for its transfer as a part of an exchange for other property or relinquishment of community rights. Care must be exercised in this connection lest the government assess a gift tax upon the ground that the transfer "was for less than adequate and full consideration in money or money's worth."²¹ There can be no gift, however, where the transfer of insurance is made subject to court approval and a court order is made directing its disposition. In *Harris v. Commissioner*²² the marital separation agreement provided that it should not become binding unless

¹⁹As to the repercussions where this is not done, see *Grim v. Grim*, 26 Cal.(2d) 173, 157 P.(2d) 841 (1945), where the agreement provided: "and second party hereby transfers, releases and relinquishes to first party all interest in and to said policy of insurance and the premiums paid thereunder and the avails thereof." The husband neglected to change the beneficiary and the divorced wife was held entitled to all of the proceeds of the policy. The court stated that it would have reached a contrary conclusion had the provision above suggested been included in the agreement. The dangers inherent in not seeing that the beneficiary is changed under the policy is illustrated in *Jenkins v. Jenkins*, 112 Cal. App. 402, 297 P. 56 (1931), in which a husband was awarded the policy by a property settlement agreement, neglected to change the beneficiary, continued to pay premiums on the policy, remarried and subsequently died. The second wife was restricted to a claim against the proceeds as to one-half of that part which was allocable to premiums paid from community funds.

²⁰For a consideration of tax problems and separation agreements generally, see Halpern, *INCOME TAX EFFECT OF COMMUNITY PROPERTY DIVISIONS INCIDENT TO DIVORCE*, 23 Cal. S. B. Journal 128 (1948); Kent, *PROPERTY SETTLEMENT AGREEMENTS IN COMMUNITY PROPERTY STATES, 1948 MAJOR TAX PROBLEMS, PROCEEDINGS OF THE TAX INSTITUTE*, University of Southern California School of Law, p. 9; Manella, *CURRENT DEVELOPMENTS IN THE TAXATION OF ALIMONY, 1948 MAJOR TAX PROBLEMS, PROCEEDINGS OF THE TAX INSTITUTE*, University of Southern California School of Law, p. 43; Rudick, *MARRIAGE, DIVORCE AND TAXES*, 2 Tax L. R. 123 (1947).

²¹I.R.C. 503; *Commr. v. Weymess*, 324 U. S. 303, 45-1 USTC, Para. 10,179 (1945); *Merrill v. Fahs*, 324 U. S. 328, 45-1 USTC, Para. 10,180 (1945). For a full discussion of this problem in general and of possible future developments in this field, see Kent, *PROPERTY SETTLEMENT AGREEMENTS IN COMMUNITY PROPERTY STATES* (1948), *MAJOR TAX PROBLEMS, PROCEEDINGS OF THE TAX INSTITUTE*, University of Southern California School of Law, p. 9.

²²340 U. S. 106, 71 S. Ct. 181, 50-2 USTC, Para. 10,786 (1950).

an absolute decree of divorce was rendered to the parties. The decree subsequently rendered provided for the survival of the agreement and its enforcement by an action on the contract, or by a finding of contempt by the court. The Supreme Court held that "it would look to the source of the rights and not the manner of their enforcement," and, since the rights under this agreement were created by direct court order, there could be no gift.

Of course, there is no gift when the settlement agreement is contested in the trial court, and it decrees a different disposition of the policy than was provided for in the agreement.²³

(2) *Estate tax.* Having transferred the policy, the transferor should be sure that any proceeds paid under it are not included in his estate for estate tax purposes. Since they may be so included, to the extent of any incidents of ownership he may possess at death,²⁴ it is important that all incidents of ownership be disposed of in the agreement. Likewise, the I.R.C. provides that insurance shall be taxable in a decedent's estate to the extent to which premiums are paid, directly or indirectly, by him. This amount may be reduced to the extent that he has received a consideration in money or money's worth for the policy. Therefore, it is incumbent upon the transferor of any insurance policy to see that the consideration he receives therefor is spelled out in the separation agreement.

(3) *Income tax.* Some aspects of the income tax problems raised by transfer of an insurance policy in divorce proceedings were discussed in the last issue of the BAR BULLETIN.²⁵ This article will touch briefly upon other aspects.

Transfer of a policy in an exchange of property rights involves the possibility of either a taxable gain or a deductible loss. There is, of course, no loss on an equal division or partition.²⁶ If, however, the premiums had been paid on the policy from separate property and the policy is transferred to one of the spouses for a release of property interests, there is an adversary transaction, resulting in gain or loss.²⁷

²³*Commissioner v. Converse*, 163 F.2d 131 (C. C. A. 2, 1947).

²⁴I.R.C., Sec. 811(g).

²⁵*Sanders, Income Tax Consequences of the Payment of Life Insurance Premiums by a Divorced Husband*, 27 L. A. BAR BULLETIN 47 (Oct., 1951).

²⁶*Frances R. Walz*, 32 BTA 718 (1935), in which the Court asked the rhetorical question: "Can it be said that, when two or more parties are the owners in common of a mixed aggregate of assets purchased for profit and decide to partition it, a gain or loss results from such partition?" But caution should be exercised to make sure the transaction constitutes a partition. See Thompson, 27 L. A. BAR BULLETIN 7, at 24, *et seq.* (September, 1951).

²⁷*C. C. Rouse*, 6 T.C. 908 (1946). See also *Johnson v. United States*, 135 F.(2d) 125, 130 (C. C. A. 9, 1943).

B. Use of policy to implement alimony or support payments after death of insured.

(1) *Gift tax.* If such a use involves transfer of the policy, the discussion of gift tax problems in section A(1) above applies. If the policy is not transferred, there is, of course, no problem.

(2) *Estate tax.* The use of a policy on the husband's life to implement alimony or support payments after his death will present questions in the tax treatment of his estate. The proceeds of the policy might well be includible in his estate to the extent of the premiums paid by him.²⁸ Again, this problem may be avoided by a provision for the husband's payment of the premiums in the divorce decree itself.²⁹ If that is done, the proceeds paid are excludible from his estate as an obligation, even though the wife might lose her interest in the proceeds in the event of her remarriage.³⁰

(3) *Income tax.* The same problems of possible taxable gain or loss exist in connection with the use of insurance to implement alimony or support payments as in the case of transfer in an exchange of property rights. Unless the policy is transferred as part of a partition of community property, the transferor would realize gain to the extent the cash value of the policy at the time of transfer exceeded the total premiums paid.³¹

In using a policy to implement alimony and support the attorney must consider the method of payment of premiums thereon. Where there has been an absolute transfer of the policy to the wife and she is designated as the "irrevocable" beneficiary therein, any premiums paid by the husband are taxable to the wife and deductible by him.³²

An interesting variation of this problem was involved in the case of *Estate of Boies C. Hart*,³³ in which the agreement pro-

²⁸I.R.C. 811(g). This is on the theory that the premiums were paid directly by the husband. However, the weakness in the argument lies in the fact that the theory upon which the premiums have been taxed to the wife is that they have been paid on her behalf in the same manner as alimony. It might well be argued that, having been taxed upon the premiums paid as income to her, the wife, for tax purposes, should be considered to have made the payment of premiums herself.

²⁹*Comm'r v. State Street Trust Co.*, 128 F.(2d) 618, 42-2 USTC, Para. 10,190 (C. C. A. 1, 1942). For a consideration of the substantive law aspects of inclusion of separation agreements in divorce decrees, see a comment by Miller & Loube, *LEGAL PROBLEMS OF DIVORCE PROPERTY SETTLEMENTS IN CALIFORNIA*, 39 Cal. L. R. 250 (1951).

³⁰The courts have held that the value of this reversion may be calculated according to modern actuarial tables. *Estate of Pompeo Maresi*, 6 T.C. 582 (1946), aff'd 156 F.(2d) 929 (C. C. A. 2, 1946). See also *Estate of Chas. B. DuCharm*, 164 F.(2d) 959, 47-2 USTC 10,588 (C. C. A. 6, 1947); *Estate of Reinhold H. Forstmann*, 6 T.C.M. 136 (1947).

³¹*Comm'r v. Mesta*, 123 F.(2d) 986, 41-2 USTC 9168 (C. C. A. 3, 1941); *Comm'r v. Halliwell*, 131 F.(2d) 642, 42-2 USTC 9,790 (C. C. A. 6, 1942).

³²I.T. 4001, 1950-1 C.B. 27; *Anita Quinby Stewart*, 9 T.C. 195 (1947).

³³11 T.C. 16 (1948).

vided for an allocation of the husband's income to the wife, out of which a certain amount was to be paid for insurance premiums on a policy on the husband's life, for the benefit of the wife. The agreement likewise provided that the wife might change the allocation as to the insurance policy and that she, further, would lose all benefit in the event of her remarriage. The Tax Court held that the premiums paid on the policy were for the benefit of the wife and were taxable to her and deductible by the husband.

In the event of the ex-husband's death, the question will arise as to the taxability of proceeds as income to the wife to whom they are paid. I.R.C., Sec. 22(b)(1), provides for the exclusion from gross income of proceeds paid under an insurance policy by reason of the death of the insured. However, an exception to this rule is contained in Internal Revenue Regs. 111, Sec. 29.22(b)(2)-4, which provides that the full amount of any periodic payment received by a former spouse is taxable to her in the year received if the conditions of I.R.C. 22(k) are met. It is not clear whether the payments so received must be for an indefinite period or one beyond ten years as the Regulations on I.R.C. 22(k) provide. If so, the 22(k) exception could be avoided by a lump sum settlement or provision for payments of proceeds for a period under ten years.

It has been argued that where the policy has been transferred to the wife and she has paid the premiums herself, she is entitled to deduct the actual value of the property rights transferred for the policy and the amount of the premiums paid by her, as a transferee for value under Internal Revenue Regs. 111, Sec. 29(b)(2)-3. Another uncertainty exists, in that it is not known if periodic payments would be fully taxable to the wife where the premiums had been paid by the husband in such a manner that they constituted constructively received income upon which tax had been paid by the wife.

The best treatment would be to tax the wife fully on proceeds received where she had given nothing of value in return for the policy and had not received any taxable income through the payment of premiums. This would subject her to tax under 22(k) on indefinite or long-term payments, or to a full tax in the year of death of the decedent or any lump sum payment. By the same token, where the wife has transferred anything of value for the

policy or paid the premiums thereon, she should be entitled to a full set-off, as a transferee for value. However, in light of the grave uncertainty of tax treatment of proceeds on an insurance policy where premiums have been paid by the decedent,³⁴ and of the possibility of taxation of these proceeds in the estate of the decedent, it would seem advisable to avoid such a method of premium payment wherever possible. This can be simply done by the inclusion in the alimony payments of a sufficient amount to enable the transferee spouse to pay the premiums, thus avoiding the dangers to both transferor and transferee.

C. Use of policy as a pledge to secure alimony payments.

(1) *Gift tax*. There is no gift because, even if the policy is eventually forfeited and transferred, the transfer is for value.

(2) *Estate and income taxes*. If a life insurance policy is pledged as security for alimony payments, the separation agreement provides that the "policy shall be forfeited in the event of a default in such payments." The proceeds paid under the policy, in the event of default, are fully includible in the decedent's estate unless the pledge agreement is superseded by the decree of the divorce court. If the latter is true, the payment of the proceeds constitutes a fully deductible debt of the estate.³⁵

Premiums paid by a husband on a policy so pledged are not deductible by him for income tax purposes, and do not constitute income to the wife.³⁶

Finally, this word of caution should be given where the husband keeps the insurance policy himself and names another beneficiary: care must be exercised that the wife receives property of equivalent value for her community interest in the policy. If this is not done, at the time of payment of the proceeds the wife will make a gift of the share of the proceeds attributable to her community interest in the policy.³⁷

³⁴On the problems raised, see Rudick, *MARRIAGE, DIVORCE AND TAXES*, 2 *Tax L. R.* 123, at 153, *et seq.*, and Manella, *CURRENT DEVELOPMENTS IN TAXATION OF ALIMONY*, 1948 *MAJOR TAX PROBLEMS, PROCEEDINGS OF THE TAX INSTITUTE*, University of Southern California School of Law, p. 43, at 69, *et seq.*

³⁵*Estate of Silas B. Mason*, 43 BTA 813 (1941). Decedent had pledged policies to secure alimony payments. He defaulted in the payments and, at the time of his death, his former wife claimed the proceeds. They were held includible in his estate upon the grounds that they were payable to his executor, since they were used to pay his debts, and upon the ground that he had incidents of ownership in the policy; but they were ruled deductible as a debt of the estate, since their pledge and forfeiture was provided for in the decree of divorce, which superseded the property settlement agreement.

³⁶*Lemuel Alexander Carmichael*, 14 T.C. 1356 (1950); *Blumenthal v. Comm'r*, 183 F.(2d) 15, 50-2 USTC, Para. 9363 (C. A. 3, 1950); *Wm. J. Gardner*, 14 T.C. 1445 (1950); *Halsey W. Taylor*, 16 T.C., C.C.H. Dec. 18,125 (1951).

³⁷I.R.C., Regs. 108, 86.2(a)(9).

III. SUMMARY

Life insurance is property in which each spouse has a community interest, which should be disposed of at the time of divorce. A trial court has broad powers and wide discretion in settling the rights of the spouses in this, as any other property. These rights can and, if possible, should be settled in the separation agreement. In any such agreement, all of the various rights in the policy should be provided for and, when necessary, the changes in beneficiaries and possession of the policy consummated. Where a policy is transferred as part of an exchange for other property or relinquishment of community rights, care must be exercised that an equal division or partition of the community property takes place, in order to avoid federal gift and income tax difficulties. If this is not practical, the disposition of the policy should be incorporated in the divorce decree. Likewise, in this situation, in order to avoid inclusion of the proceeds in the transferor's estate for tax purposes, all incidents of ownership should be released by the transferor and premiums paid directly by the transferee. When insurance is used to implement alimony or support provisions, the best result, taxwise, will be obtained by transfer of the policy and inclusion of a sufficient amount in the alimony payments to enable the transferee to pay the premiums herself. Variations of these problems are involved in the pledge of insurance to secure alimony or support payments.

While these last statements share the failings of all general pronouncements on the law, there is one obvious and incontrovertible conclusion. The wise practitioner will place life insurance high on his check list of items of property to be given careful consideration in drafting any marital separation agreement.

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By Earl C. Bergeson

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LANGUAGE FROM THE COURTS

Judge Medina in the Middle of a Long Antitrust Suit.

UPON the resumption of the trial in *United States v. Morgan, et al.* (the investment bankers' case) on October 3, 1951, Judge Harold R. Medina addressed himself to counsel as follows:

"When I was first assigned to this case some years ago there was talk of it being a case of such complexity that the trial would take some four years. My immediate reaction was that there did not exist any kind of case that could possibly take four years; that if it had such complexity and such extent as to even make it possible that such a thing might happen, that would be pretty good evidence that it was not the sort of a case that ought to come up in court at all. But in any event, I very blandly went ahead thinking that if I was careful with the pre-trial procedure here we could soon bring the case within reasonable bounds.

"So as you all know, we spent some years of pretty persistent

effort to do everything conceivable to remove unnecessary time-consuming elements from the trial. Then we got started.

"I went through some months of the trial feeling that my inexperience with antitrust matters, and my lack of familiarity with the techniques of that particular branch of the law made it necessary for me to proceed with caution. I did that. I finally came to the summer recess this year feeling that at least I had become pretty familiar with the authorities by dint of a lot of work, . . .

"As a result I now rule:

"One. That I shall exclude all evidence having to do with transactions prior to January 1st, 1935. I shall of my own motion strike out everything that is in the case now prior to 1915, and in 1915, and in those early years prior to January 1st, 1935. I shall anticipate in due course some Memorandum from Counsel for the defendants so that my striking shall be specific with notation of exhibits and with proper identification of testimony.

"I am doing that very largely as an administrative measure. We will simply never be through with this case unless we have some reasonable limitation of the period that the case is supposed to cover. The human mind is simply incapable of encompassing the vast area that this case has so far covered, and it has seemed to me also, on the most mature reflection, that there can be no possible prejudice to the prosecution, to the Government's position here, by eliminating all those early things with respect to which most of the participants have long since died, and as to variations in the firms and the new firms and the new individuals coming on here, the whole thing gets into a terrific chaos and morass with little help, as I see it, to the prosecution, despite their insistence upon the so-called origin of the alleged conspiracy in 1915.

"If there be any conspiracy that should be the subject of adjudication here it must be, as I see it, that with the 15 or 16 years' duration from January 1, 1935, to the date of the filing of the complaint, there should be affirmative proof of the existence and operation of the alleged conspiracy and the participation by the various defendant firms and those who are parties here.

"It is simply inconceivable to me, not as a matter of first blush, but as a matter of the most mature deliberation and consideration with all that I have learned about the case in the seven months that we have already been on trial, that it should be necessary to go back into all that ancient history, and I won't do it."



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NOTES ON NEW LEGISLATION

(Continued from page 92)

Definition of Security.

The statutory definition of security in Section 25008, now specifically provides that the evidence of an indebtedness need not bear interest to be a security (Ch. 825).

CODE OF CIVIL PROCEDURE.**Computation of Time as to Holidays.**

The period of time for doing any act provided for or required by law is now extended only if the last day of such period is a holiday. That portion of Section 12a of the Code of Civil Procedure which made extension for intervening holidays has been omitted (Ch. 492). By the addition of Section 12b, if any public office, other than a branch office, is closed for the whole of any day, that day is considered a holiday for the purposes of business at that office (Ch. 655, Sec. 25).

Interpleader.

Section 386 of the Code of Civil Procedure, which heretofore provided that a defendant against whom conflicting claims may be asserted might apply to the court for an order substituting other persons and be discharged from liability upon depositing the amount in controversy in court, has been liberalized by authorizing the filing of a verified cross-complaint as an alternative to proceeding upon affidavit and application. Interpleader procedure is further improved by clarifications which provide that conflicting claims are deemed issues triable by the court and that such issues shall be first tried; any issues relating to a claimed deficiency in the deposit or delivery shall then be tried to the court or jury as appropriate (Ch. 1142).

Service of Summons by Publication.

By amendment of Section 413 of the Code of Civil Procedure, service of summons by publication is now to be accomplished pursuant to Section 6065 of the Government Code, except in the case of summary proceedings to obtain possession of real property (Ch. 43).

Personal Judgment Based on Personal Service Outside the State.

By the addition of Section 417 to the Code of Civil Procedure, the California courts are given jurisdiction to render personal

judgment against California residents who have been personally served outside the state (Ch. 935).

Minimum Amount for Attachment.

The law of attachment has been substantially adjusted to the cost-of-living index by Chapter 776, which amends Section 538 of the Code of Civil Procedure by raising the minimum amount for which an attachment may be issued from \$15 to \$30.

Judgment Notwithstanding Verdict.

Two important procedural changes, effective January 1, 1952, have been brought about by the amendment of Section 629 of the Code of Civil Procedure. (a) A motion for judgment notwithstanding the verdict may now be made either before or after entry of judgment. (b) A striking innovation permits the court to grant *both* the motion for judgment notwithstanding the verdict and the alternative motion for a new trial, subject to the proviso that the order granting a new trial shall be effective only if the order granting judgment notwithstanding the verdict is reversed on appeal. This latter amendment permits an immediate and final disposition of a case by the trial court (Ch. 801).

Enforcement of Judgment for Possession of Personal Property.

By the addition of Section 684.1 to the Code of Civil Procedure, execution on a judgment for possession of personal property is now enforceable in the same manner as a judgment for real property (Ch. 777).

Levying on Mortgaged Chattels.

An amendment of Section 689b of the Code of Civil Procedure stays attachment and sale of personal property in satisfaction of a judgment for 30 days following service on the mortgagee thereof of a written demand to disclose the amount of the debt and to accept payment or tender thereof. Where a motor vehicle has been levied upon, another change requires the levying officer to notify the legal owner as well as the registered owner (Ch. 1073).

Actions to Determine Adverse Interests Arising Out of Public Improvement Assessments and Bonds.

A deficiency in proceedings to determine adverse interests has been remedied by providing for suit against heirs and devisees of persons *believed* to be dead. Previously, Section 801.3 of the Code of Civil Procedure permitted the naming of heirs and devisees only where the person was known to be dead (Ch. 521).

Granting of Motion to Quash Service Appealable.

Section 963 of the Code of Civil Procedure relating to appeals from a superior court and Section 983 relating to appeals from a municipal court have been amended to permit an appeal of an order *granting* a motion to quash service (Ch. 234). The denial of a motion to quash service remains non-appealable.

Bond Premiums as Taxable Costs.

By the addition of Section 1035 to the Code of Civil Procedure, premiums on surety bonds procured as a necessary incident to legal proceedings are made an allowable cost (Ch. 1327).

Mechanics' Lien.

A number of fundamental changes have been made in mechanics' lien procedure. The general law has been recodified in Sections 1181 to 1203.1, inclusive, of the Code of Civil Procedure (Ch. 1159). The addition of Section 1193.1 permits the filing of a notice of cessation from labor at any time after 30 days' cessation, instead of within 10 days after 30 days' cessation of labor. Cessation of labor, whether or not a notice thereof is filed, constitutes completion, except that public improvements shall not be deemed complete until approval by public authority (Ch. 1376). Under Section 1190.1 a claimant may file a stop notice which is effective to create a duty for a lender or escrow holder to withhold funds for the claimant's benefit upon the claimant filing a bond equal to $1\frac{1}{4}$ times the amount of his claim (Ch. 1382). Section 1188.2 provides for priority of a mortgage or deed of trust recorded subsequent to commencement of work if the holder of such mortgage or deed which is otherwise inferior files a bond in an amount not less than 75% of the principal amount of such mortgage or deed of trust (Ch. 1274).

The Right to Open and Close in Condemnation Proceedings.

The addition of Section 1256.1 to the Code of Civil Procedure creates an exception to the general rule according to a plaintiff the right to open and close by providing that in condemnation proceedings the defendant shall commence and conclude argument (Ch. 766).

Reciprocal Enforcement of Support.

By the addition of Title 10a, Sections 1650-1654, 1660-1661, and 1670-1681, to the Code of Civil Procedure, California has initiated a new uniform law designed to effectuate an interstate

enforcement of the duty of support of a deserting spouse who has fled a particular jurisdiction. Realization of the purposes of this chapter must, of course, await the enactment of reciprocal legislation in other jurisdictions. The statute presents two outstanding innovations from a conflict of laws viewpoint in that (1) a state which has furnished support to a person to whom a duty of support is owed is given a civil cause of action against the person owing the duty of support or property of such person in this state, and (2) the *measure* of the obligation of support is not governed by the law of the state where the obligor is served or where his property is located, but rather is determined by the law of the state *either* where the obligor was present during the period for which support is sought *or* where the obligee was present when the failure to support commenced, at the election of the obligee (Ch. 694).

Photographic Copies as Evidence.

The Uniform Copies of Business and Public Records as Evidence Act has been adopted verbatim by the addition of Sections 1953i and 1953j to the Code of Civil Procedure. Any reproduction of a business record, satisfactorily identified, by any process



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which forms a durable medium is admissible as evidence without accounting for the original. The qualification obtains, however, that such reproduction must be in the regular course of business (Ch. 346).

Service of Subpoena Duces Tecum.

The addition of Section 1987.5 to the Code of Civil Procedure renders the service of a subpoena *duces tecum* invalid unless there is a simultaneous service of a copy of the affidavit upon which the subpoena was issued (Ch. 1413).

Examination of Adverse or Interested Persons.

Examination of a witness as if under cross-examination has been substantially broadened to include *any* member, agent or employee of an adverse party. Formerly Section 2055 of the Code of Civil Procedure included within its terms only the adverse party and his officials and managing agents (Ch. 1176).

PROBATE CODE.

Testamentary Disposition to the United States.

The discriminatory exclusion of the United States as a beneficiary has been removed by the amendment of Section 27 of the Probate Code which now authorizes a testamentary disposition to be made in favor of the United States or any of its instrumentalities (Ch. 223).

Simultaneous Death—Community Property.

The community property provision in the Uniform Simultaneous Death Act has been modified by the amendment of Section 296.4 of the Probate Code to specifically provide that where a husband and wife have died simultaneously, the one-half of the community property to be dealt with as if the husband had survived shall be treated as if it were his separate property, and the other half is similarly treated in the estate of the wife. New Sections 296.41 and 296.42 provide for a simple proceeding by which there may be a conclusive determination that joint tenants or husband and wife have died simultaneously (Ch. 529).

Dedication or Conveyance of Real Property for Public Use Without Consideration.

Sections 587 and 1515 of the Probate Code are enlarged to permit an executor or administrator to dedicate or convey for a public use and without consideration not only an easement in real property, but also real property itself (Ch. 192).

Family Allowances.

By the amendment of Section 680 of the Probate Code, a surviving husband, in addition to a widow and minor children, is now entitled to a reasonable allowance out of an estate during the progress of its settlement (Ch. 1089).

Vacating Prior Order of Confirmation.

By the addition of Section 789 to the Probate Code, the court may vacate a prior confirmation of sale of property where a petition is filed within 45 days after such confirmation and the petitioner establishes that the purchaser has failed to complete the purchase and that another bid has been made in the same or higher amount (Ch. 779).

Mandatory Proceedings to Establish Death in a Joint Tenancy.

The controversial amendment of Section 1170 of the Probate Code makes court proceedings to determine the interests of surviving joint tenants in real property mandatory rather than merely permissive (Ch. 779).

Investment of Moneys Received in Settlement of Minor's Disputed Claim.

By the amendment of Section 1431 of the Probate Code, moneys received in a court-approved compromise or settlement of a minor's disputed claim may now be invested in an account in an insured savings and loan association as well as deposited in a bank or trust company (Ch. 204).

VEHICLE CODE.

Liability of Owners of Motor Vehicles.

Section 402 of the Vehicle Code was amended to increase the limit of liability of an owner, for negligence imputed to him by reason of the operation of a motor vehicle by another person, from \$1,000 to \$5,000 for damage to property of others in any one accident; the limits of \$5,000 for the death or injury of one person and \$10,000 for the death or injury of more than one person remain unchanged. In addition, the section was amended to provide that an action pursuant to the section would not be abated by the death of any injured person or of any person liable or responsible under the provisions of the section (Ch. 1469).

CHANGES IN CODIFICATION.

The following new codes have been enacted:

(1) Financial Code, which is a codification of the laws relating to organization, regulation, supervision of financial institutions and designated financial transactions, such as industrial loans, loan brokers, personal property brokers, small loans, etc.

(2) Public Utility Code, which is a codification of the laws relating to public utilities and other regulated businesses and matters incidental thereto.

The Political Code has been repealed and most of the former sections have been recodified into the other codes.

MISCELLANEOUS.

Notice by Publication.

In numerous instances where notice by publication is provided in the various codes, amendments have been made to provide that such notice by publication shall be made in the manner prescribed in the appropriate sections of the Government Code (See *e.g.*, Sections 6065 and 6066). Sections involving notice by publication in any of the various codes should be checked for amendment in this regard.

Brothers-In-Law

By George Harnagel, Jr., Associate Editor

THE Public Relations Committee of the Minnesota State Bar Association is cooperating with the Farm Extension Service of the State University in presenting a program called "Your Property and Your Heirs" in rural areas throughout the state. These presentations open with two simple quizzes on property and wills which the farm people answer. They are followed by a skit entitled "Property Is a Family Affair" and talks by visiting lawyers. The speakers are cautioned to make it clear that they represent the Bar as a whole, not themselves, and that all the lawyers in the community are competent to give specific advice on the subjects discussed in general terms at these meetings.

* * *

The Committee on Federal Procedure of the Missouri Bar has gone on record in favor of an amendment to Rule 26(b),

Federal Rules of Civil Procedure, relating to depositions, which would limit them to testimony admissible at the trial. The proposed amendment would eliminate the following sentence: "It is no ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

* * *

"Many of us . . . were not yet conceived when the first automobile chugged down Main Street of the old home town. Since that memorable day . . . there have been innumerable automobile accidents, thousands upon thousands of law suits growing out of those accidents, and hundreds upon hundreds of appellate court decisions. Still, after half a century, we find ourselves in the embarrassing position in regard to instructions to the jury in plain, ordinary automobile accident cases in which the lawyers do not know how to write the instructions, the trial judges do not know whether or not they are correct, and only God understands them." From an article entitled, "Instructionese, Legalistic Lingo of Contrived Confusion," by Hon. Phil H. Cook, Judge of the 15th Judicial Circuit of the State of **Missouri**, recently published in *Journal of The Missouri Bar*.

* * *

A recent report of the Committee on Unauthorized Practice of Law of the **District of Columbia** viewed with alarm "... the apparently growing practice of out-of-town lawyers who are not members of the bar of any court of the District of Columbia appearing before the courts here without associating local counsel with them." In an effort to remedy this situation the Committee has proposed an amendment of the District Court Rules designed to require "the presence in court of an associated local counsel at all times when out-of-town counsel appears before the court."

* * *

Climaxing a two-year fight in which the lawyers of **Minnesota** pitted themselves against accountants and other lay tax advisers, the Supreme Court of that state has ruled that only lawyers may lawfully give advice on "difficult and doubtful" income tax questions.



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